No. 34399

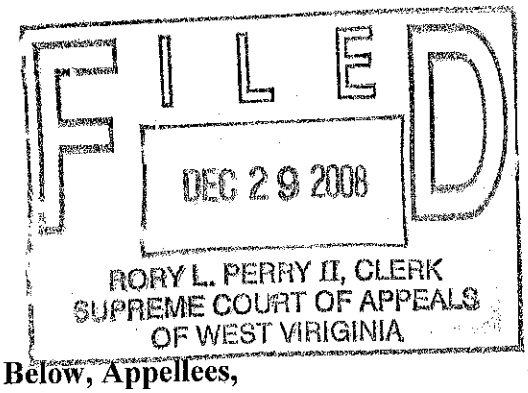
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MICHAEL BLANKENSHIP and
MISTY BLANKENSHIP,

Plaintiffs Below, Appellees,

v.

THE CITY OF CHARLESTON and
BOSTON CULINARY GROUP, INC.
d/b/a DISTICTIVE GOURMET,



Defendants/Third-Party Plaintiff Below, Appellees,

v.

LAKEWOOD SWIM CLUB, INC.

Third-Party Defendant/
Fourth-Party Plaintiff Below, Appellant,

v.

EVANSTON INSURANCE COMPANY,

Fourth-Party Defendant Below, Appellee.

From the Circuit Court of Kanawha County
The Honorable James C. Stucky
Civil Action No. 06-C-2062

REPLY BRIEF OF LAKEWOOD SWIM CLUB

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Appellant Lakewood Swim Club ("Lakewood") submits the following Reply to the Brief of Appellee Evanston Insurance Company ("Evanston's Brief"). This Reply is presented in conjunction with and in addition to the arguments presented in the Appeal Brief of Lakewood Swim Club.

DISCUSSION

1. Lack of a Contract between Lakewood and Boston Culinary Group is irrelevant to the issues concerning coverage to be decided by this Court

In its Brief, Evanston notes that there is no contract between Lakewood and Boston Culinary Group relative to the operation of the subject concession stand. *See* Evanston's Brief pp. 1-2, 9. Lack of any such contract is, however, wholly irrelevant to the issues concerning insurance coverage to be decided here.

It is undisputed that it was Lakewood members who were operating the subject concession stand as a fundraising project for the club. *See* Exh. B attached to Lakewood's Brief. And, Plaintiff's claims for negligence arise out of Lakewood's operation of that concession stand and are based upon the alleged negligence of the members who were operating that concession stand. *See* Exh. E, Plaintiff's Responses to Lakewood's Requests for Admission, attached to Lakewood's Brief. Further, Boston Culinary Group admits that the concession stand was operated as a project of Lakewood. *See* Exh. F, Boston Culinary Group's Responses to Lakewood's Requests for Admission, attached to Lakewood's Brief.

The issue in this appeal is whether coverage exists for the claims made against Lakewood under the provisions of its insurance policy with Evanston (the "Policy"). The existence of any contract, or lack thereof, between Lakewood and Boston Culinary Group is irrelevant to that determination.

2. The Policy Must be Read as a Whole in Determining Whether There is Coverage for The Claims Made Against Lakewood

Evanston argues that this Court must look solely at the "Specified/Designated Premises/Project Limitation" Endorsement in deciding whether there is coverage under the Policy for the claims made by Plaintiff against Lakewood. *See* Evanston's Brief p. 10. It is asking this Court to apply only that particular portion of the Policy that it unilaterally and advantageously interprets and deems applicable. This argument is not only erroneous, but is contrary to West Virginia law. It is well-settled that "contracts should not be fragmented for interpretative purposes; rather, " 'where the whole can be read to give significance to each part, that reading is preferred.' " *In re Tackley Mill, LLC*, 386 B.R. 611 (N.D.W.Va. 2008) (citation omitted).

When the referenced endorsement and the terms of the Policy are read together and as a whole as is required, it is clear that coverage for Lakewood is provided. The Policy clearly states that a "bodily injury" need not occur on Lakewood's premises in order to trigger coverage. Rather, there is coverage so long as the injury is caused by an occurrence within the "coverage territory," which is defined, in part, as "[t]he United States of America." *See* Exhibit C at 0019 attached to Lakewood's Brief. Here, Plaintiff Blankenship's claimed injury is a "bodily injury" within the "coverage territory" and during the Policy period of May 10, 2005 to May 10, 2006 – on October 14, 2005. Contrary to Evanston's assertion, the "Specified/Designated Premises/Project Limitation" Endorsement, when read in conjunction with the whole Policy, does not preclude coverage for the claims made against Lakewood. This endorsement provides that the Policy applies to "bodily injury" arising out of: (1) The ownership, maintenance or use of the premises shown in the Schedule or (2) The ***project*** shown in the Schedule. *See* Exhibit C at 0041 attached to Lakewood's Brief. The term "project" is undefined but references "Private

Swim Club" in the Schedule. *Id.* The Affidavits of Jeff H. Goode and Tim Quinlan, Jr. establish that the concession operation at the concert was a project of the Lakewood and that this fundraising activity was in the normal course of business for Lakewood. *See* Exhibits A and B attached to Lakewood's Brief. Additionally, Plaintiff and Boston Culinary admitted in their responses to Requests for Admission that the concession stand was a fundraising project of Lakewood. *See* Exhibits E and F attached to Lakewood's Brief. Under Evanston's interpretation of the endorsement, no off-premises fundraising project for the club would be covered under the Policy. This is clearly contrary to the express provisions of the Policy.

Moreover, to the extent this Court finds that the terms of this endorsement conflict with the Policy or are ambiguous, such conflict and/or ambiguity must be construed in favor of coverage for Lakewood. *See e.g. National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds by Potesta v. U.S. Fidelity & Guar. Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998); *Estate of Tawney v. Columbia Natural Resources, L.L.C.*, 219 W.Va. 266, 633 S.E.2d 22 (2006); Syl. Pt. 3, *Polan v. Travelers Insurance Co.*, 156 W.Va. 250, 192 S.E.2d 481 (1972).

3. The Supplement to the Policy Application Cannot Operate to Preclude Coverage for Lakewood in this Matter

Succinctly, Evanston claims that it allegedly had no reasonable expectation of providing coverage under Policy for claims relating to Lakewood's fundraising project because of its responses to certain questions on a supplement to the Policy application. *See* Evanston's Brief pp. 9, 12-14. Evanston must not now be permitted to arbitrarily and improperly deny coverage on such a basis.

This supplement inquired whether Lakewood "sponsored" "outside events" or "engaged in any special events on or off the swim club premises." *See* Exh. E attached to Evanton's Brief.

None of these terms are defined in the supplement. And, significantly, none of these terms are even included, much less defined, in the Policy.[1] Indeed, Evanston took no steps to exclude activities off the swim club's premises from coverage under the Policy.

The plain language of the Policy, which is the pertinent document herein, states that a "bodily injury" for which coverage is provided need not occur on Lakewood's premises. *See* Exh. C at 0019 attached to Lakewood's Brief. Had Evanston truly wanted to exclude coverage for off-premise fundraising projects, as it did for dozens of other possible occurrences, it could simply and easily have done so. Evanston must not now, belatedly and advantageously, be permitted to deny coverage by arguing that it had no reasonable expectation of providing coverage for off-premise projects based on responses to undefined and ambiguous questions in its own Policy application.[2] Under the clear provisions of the Policy, as written by Evanston, Lakewood had a reasonable expectation that its off-premise fundraising project at the Civic Center would be covered by the terms of its Policy with Evanston. It is well-settled that,

> '[a]n insurance contract should be given a construction which a reasonable person standing in the shoes of the insured would expect the language to mean.' ... With respect to insurance contracts, the doctrine of reasonable expectations is that '[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.'

National Mut. Ins. Co. v. McMahon & Sons, 177 W.Va. 734, 741, 356 S.E.2d 488, 495 (1987), overruled on other grounds by *Potesta v. U.S. Fidelity & Guar. Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998), *quoting*, *Soliva v. Shand, Morahan & Co.*, 176 W.Va. 430, 345 S.E.2d 33, 35-36

[1] As discussed in its Brief, Lakewood submits that the Circuit Court's significant reliance on this supplement was erroneous and improper.

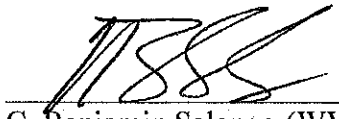
[2] In fact, Evanston's proposed definitions for the terms "outside" events "on or off the premises" in the supplement to the Policy application (which, according to Evanston, would exclude coverage for off-premise fundraising events) directly conflict with the express terms of the Policy which provides that a "bodily injury" need not occur on Lakewood's premises in order to trigger coverage.

(1986); and, Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv.L.Rev. 961 (1970). *See also, Perkins v. Doe*, 177 W.Va. 84, 350 S.E.2d 711 (1986); *Hensley v. Erie Insurance Co.*, 168 W.Va. 172, 283 S.E.2d 227 (1981); *Thompson v. State Automobile Mutual Insurance Co.*, 122 W.Va. 551, 554, 11 S.E.2d 849, 850 (1940). Moreover, any uncertainties in "an intricate and involved contract" such as the Policy at issue "should be resolved against the party who prepared it." *Estate of Tawney v. Columbia Natural Resources, L.L.C.*, 219 W.Va. 266, 273, 633 S.E.2d 22, 29 (2006). Accordingly, coverage for Lakewood must be provided under the Evanston Policy.

PRAYER FOR RELIEF

Lakewood Swim Club, a non-profit organization, was left without a defense and without coverage as a result of the Circuit Court's ruling. For the reasons stated in this Reply and in its Brief, Lakewood respectfully requests that this Court reverse the December 11, 2007 Order of the Circuit Court of Kanawha County granting summary judgment in favor of Evanston, with instructions to the Circuit Court of Kanawha County to enter judgment in favor of Lakewood on the declaratory judgment action, and for such other relief as this Court deems appropriate.

LAKEWOOD SWIM CLUB
By counsel



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CERTIFICATE OF SERVICE

I, C. Benjamin Salango, hereby certify that a true and correct copy of the foregoing **Reply Brief of Lakewood Swim Club** has been served on December 29, 2008, by mail addressed to the following:

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